I therefore hold that the first defendants have established that there has been both a loss by theft and cesser of liability covered by the two exemption clauses.

The Port Swettenham Authority, the second defendants in this case, deny all liability. They say they are protected by Rule 91(1) of the Port Authority By-laws, 1965 (L.N. 127/1965) which reads:

"The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless such loss, or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

This places the onus on them to show some circumstance which negatives the idea of misconduct or negligence on their part. (See *Sharikat Lee Heng Sdn. Bhd.* v. *Port Swettenham Authority*[8]). Negligence means nothing more than the doing of some act which a person of ordinary prudence would not do under the circumstances or the omission to do some act which a man of ordinary prudence would do under the circumstances. The test is that of a man of ordinary prudence would take of his own goods in similar circumstances (see section 104 of the Contracts (Malay States) Ordinance, 1950).

In essence the second defendants are bound to exercise as much care and diligence in keeping and preserving the goods entrusted to them on behalf of the plaintiffs as a custodian for reward would do under similar circumstances. That is all they are required to do. They are not supposed to do the impossible. If the goods are stolen by their servants, in the absence of negligence on their part, they cannot be held liable. In the absence of personal negligence on the part of the employer *e.g.*, negligence in selecting the servant whose act had occasioned the loss, (see *Williams* v. *Curson Syndicate Ltd.*[9]) the latter is not responsible for the fraudulent act of the servant, as the loss of the goods is not referable to the employer's negligence, and as the loss is caused by an act which is not within the scope of the servant's employment. (See *Cheshire* v. *Bailey*[10]).

Now the facts. Evidence was adduced to the effect that goods were unloaded on the instructions of the shipping agents on to pallets at the ship's side. From there they were conveyed by forklifts operated by employees of the second defendants. They had to pass through a door of the godown and under the direction of the clerk-in-charge of the said godown the goods were stored. No record was kept by the second defendants. Instead outturn statements were issued. The godown, which was about 40 feet from the ship, was like any other jetty godown; it was made of corrugated iron sheets over a brick 4 ft. wall from ground level. There were strategic doors manned by the second defendants' servants for the purpose of receiving and delivering goods at specific times. Four checks were made at all times — on forklifts, on delivery lorries, at delivery platform and at the entrance gate. Uniformed policemen guarded the area round the clock; plain clothes detectives were also employed. There had been a few attempts of theft but in most cases they were nipped in the bud. In 1967 a Study Committee was appointed to streamline the administration of the Port and as a result the second defendants abolished wharf tallying at the relevant period.

On the whole I find as a fact that the second defendants had exercised due care and diligence in keeping and preserving the goods entrusted to them as any prudent custodian for reward would do under the circumstances. That was all they were required to do in law and that was done. It would be enhancing the burden of proof upon the second defendants to an absurd extent if they had to prove beyond and above that required of them under section 104 of the Contract (Malay States) Ordinance.

I am satisfied that they have discharged the onus that the loss of the goods in question is not due solely to their misconduct or negligence. The plaintiffs' case is dismissed with costs.

Claim dismissed.

Solicitors: *Shearn, Delamore & Co.; Aljeffri & Co.; Skrine & Co., Tengku Zuhri, Manan & Abdullah.*

B. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[App. Civil Juris (Chang Min Tat J.) December 28, 1972]
[Ipoh Originating Motion No. 40 of 1969]

Income Tax — Joint Hindu Family — Personal law of Hindus in Malaysia — Case Stated from Special Commissioners — Findings of fact — Whether provision as to Hindu Joint Family contrary to Constitution — Income Tax Act 1967, s. 72 — Federal Constitution, Articles 4 and 8.

This was an appeal by way of case stated from the decisions of the Special Commissioners. The Comptroller-General had assessed income tax on the basis of a Hindu joint family and the Special Commissioners had confirmed the assessments. It was argued on behalf of the appellant —

(a) that section 72 of the Income Tax Act, 1967, which deals with Hindu Joint Families does not apply to Hindus whose domicile is Malaya and can only apply to Hindus who are domiciled in India.

(b) if section 72 is held to apply to the appellant it is in violation of Article 8 of the Constitution of Malaysia and therefore void.

Held, dismissing the appeal: (1) where a Hindu has shown the deliberate preservation of his personal law, as here in the case of joint families, he is bound by such personal law, despite the fact that he has now emigrated to another country and has acquired a domicile of choice in the country of his origin;

(2) section 72 of the Income Tax Act, 1967 merely re-enacts what is the personal law by deliberate election of citizens of Hindu custom and religion;

(3) the Special Commissioners were correct in their findings of fact and the inferences they drew from such findings.

Cases referred to:-

(1) *British Insulated and Helsby Cables* v. *Atherton* [1926] A.C. 205 at p. 213.

(2) *Dorothy Yee Yeng Nam* v. *Lee Fah Kooi* [1956] M.L.J. 257 at p. 263.

(3) *Re Craignish* [1892] 2 Ch. 180.

(4) *Douglas* v. *Douglas* (1871) L.R. 12 Eq. 617.

(5) *Meyappa Chettiar* v. *F.M.S.* [1941] M.L.J. 132.

(6) *Somdara Achi* v. *Kalyani Achi* [1953] M.L.J. 147.

ORIGINATING MOTION.

M. Sivalingam for the appellant.

Nik Saghir bin Mohamad Noor (Senior Federal Counsel) for the respondent.

Chang Min Tat J.: This is a joint appeal by way of case stated from the decisions of the Special Commissioners of Income Tax in respect of the assessments of income tax on the basis of a Hindu Joint Family. One appeal was by B. s/o Shuparshad on the income of the B. Hindu Joint Family and the other was by the same B. but as administrator of the Estate of N., deceased on the income of the N. Hindu Joint Family. Inasmuch as the income on which tax was sought to be levied was derivable back to a single source which was the reason for the assessment on the basis of a Hindu Joint Family, the appeals to the Special Commissioners were dealt with as one appeal and it is proposed to adopt the same course in the appeals now before me.

For the same reason, it may be convenient at this stage to set out the family tree. The propositus of the family was one Moolchaad, who died in India in 1918. He left six sons who were, and this was admitted on behalf of some of them, members of a joint Hindu family, namely

(1) Shuparshad, who died in 1937 and of whose estate his widow Kalakathy and his brother N. were the administrators.
(2) Dau Dayal.
(3) N. who died on 25 October 1965 and of whose estate B. s/o Shuparshad is the executor.
(4) Kelascharan.
(5) Bishambar Dayal, who died in 1947, leaving a widow and of whose estate his brother N. is the administrator, and
(6) Inderbhan.

The Special Commissioners found as facts that

(1) The appellant B. s/o Shuparshad is a Hindu, born at Tapah, Perak on 30 April 1929 and is a citizen of Malaysia.
(2) Shuparshad was the eldest son and since the death of Moolchand, the family was known as the Shuparshad family.
(3) Shuparshad came to Malaya in about 1910 and after working for a time, ran a sundry shop in partnership with his former employer.
(4) All his other brothers came to Malaya one after another to assist Shuparshad in this business.
(5) Subsequently the former employer left the partnership.
(6) Between 1929-1938, the business was carried on at Tapah and since 1931 also at Tanah Rata Cameron Highlands under the style of Shuparshad and Brothers.
(7) Shuparshad managed the business until 1935 when he went to India and the management of the business was left in the hands of N.
(8) A few months after Shuparshad's departure to India, Dau Dayal also left for India and he has not been to Malaya since.
(9) Whenever N. went to India on leave, he entrusted the management of the business to Kelascharan.
(10) Shuparshad died in India on 13 August 1937, leaving a widow and two sons, B. (the appellant) and Srinivas.
(11) Bishambar Dayal died in India on 10 October 1947 leaving a widow.
(12) On 24 June 1950, the Comptroller of Income Tax advised the accountants for Shuparshad and Brothers that he proposed to treat the business as belonging to an Undivided Hindu Family for purposes of Income Tax, and in reply the accountants confirmed his instructions to so admit.
(13) On 15 April 1952, by a deed of partition between N., Kelascharan, B. s/o Shuparshad, Srinivas s/o Shuparshad, Kelawati widow of Shuparshad, Premati widow of Bishambar Dayal of the one part and Dau Dayal and Inderbhan of the other part, all the properties left by the propositus Moolchand at his death and the properties acquired by his sons and together treated as a Joint Hindu Family were partitioned between the parties thereto, the last recital making it clear that while the second party demanded the separation of their share, the first party would continue to remain united "as members of the joint Hindu family."
(14) On 28 April 1955, the accountants for Shuparshad and Brothers wrote to the Assistant Comptroller of Inland Revenue that
  (i) Nandkishore had assumed the role of Karta (manager of a joint Hindu family) on the death of Shuparshad, and
  (ii) Since 1952, the family had been divided into two
    (a) Dawdial (alias Dau Dayal) and Inderbhan
    (b) N. and others.
(15) On 7 September 1955 Das & Co. the then solicitors for Shuparshad and Brothers wrote to the Comptroller-General on the purport and effect of this deed of partition.
(16) By an affidavit affirmed on 30 December 1957, Dau Dayal maintained that at no time was he the karta of the family business in Malaya.
(17) There was issued to N. by the Government of this country a provisional passport dated 21 January 1958.
(18) On 15 February 1958, N. Kelascharan, B., Srinivas, Kelawati and Premati (*i.e.* the members of the first party in the earlier deed of partition) executed a deed of partition among themselves of the properties hitherto belonging to the Shuparshad family.
(19) A certificate of registration as a citizen of this country dated 17 February 1958 was granted to B.
(20) The business of Shuparshad and Bros. was registered as a partnership on 9 May 1958.
(21) By a deed made on 24 January 1962, Kelascharan retired from Shuparshad and Bros., and
(22) the retirement of Kelascharan was recorded in the registration of the business.
(23) On 18 October 1962, the accountants protested against the assessment of certain agricultural contract profits as part of the income of the B. joint family.

(24) In 1965, N. died, leaving three sons, the eldest of whom was born in 1932 and now lives in India and has a son.

(25) On 7 December 1966, the accountants again wrote to the Comptroller-General claiming that B. was a Federal citizen and that he be treated as an individual.

(26) Forms for return of income were issued by the Income Tax Department and addressed to the karta, N. family for 1961-1966 and these were returned duly completed and signed by or on behalf of N. as karta.

(27) Similarly, forms for return of income were issued by the Income Tax Department addressed to the karta, B. family and these were returned duly completed and signed by or on behalf of B. as karta.

(28) On 5 June 1962, the accountants wrote to the Income Tax Department that B. was taxable in his individual capacity and asked for registration as taxpayer and for a Form "B" for submission. This was complied with and on 11 August 1962, the accountants submitted the personal returns of B. The accompanying letter referred to the return of income of B. joint family.

(29) Subsequently, tax forms were issued to Brijkishore for the years of assessment 1963 to 1966 and these forms were completed and signed by or on behalf of Brijkishore and returned.

(29A) *Note:* Though this was not noted as a fact by the Special Commissioners, the personal return of B. referred only to his share of the profits from "Agricultural experimental Green Leaves Contract at 15-16 Tanah Rata, Cameron Highlands and did not include any income from the business of Shuparshad and Bros.

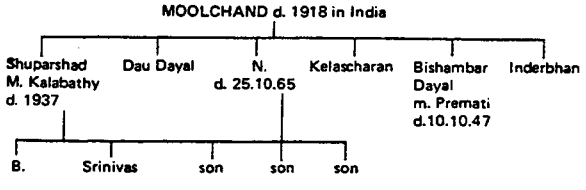
(30) N. was a citizen of Malaysia as was also Kelascharan. Dau Dayal and Inderbhan were not citizens.

(31) By notices of amended assessment dated 2 December 1967, the Comptroller-General raised assessment of income tax on the karta of the B. Hindu Joint Family for the years of assessment 1961 to 1966 on the income of that family.

(32) Also on the same date, the Comptroller-General raised amended assessment of income tax on the karta of the N. joint family for the same years of assessment on the income of that family. The notices were addressed to B. as agent for the karta.

Those were the facts as found by the Special Commissioners. They were, as I understand the arguments, not greatly in dispute.

For the sake of convenience, a genealogical tree of the Moolchand family is now drawn: —



The names of Dau Dayal and Inderbhan are underlined to indicate their separation from their other brothers by the deed dated 15 April 1952 mentioned in fact (13) above.

On these facts, the Special Commissioners held that the appellant, B., had failed to show to their satisfaction in the case of the B. Hindu Joint family —

(a) that for any of the years of assessment 1961-1966, there was no Hindu joint family of which he was the karta or

(b) that any of the income assessed to income tax on the appellant as karta of the B. Hindu Joint Family for the said years of assessment was not income of the B. Hindu Joint Family of which the appellant was the karta.

The Special Commissioners then made a deciding order confirming the assessments of income tax.

In the case of the N. Hindu Joint Family, the Special Commissioners held that the appellant had not proved to their satisfaction that —

(a) for any of the years of assessment 1961-1965, there was no Hindu Joint Family of which N. was the karta or

(b) for the year of assessment 1966, there was no Hindu Joint Family of which N.'s eldest son was the karta, or

(c) that any of the income assessed to income tax on the karta of the N. Hindu Joint Family for the said years of assessment was not the income of the N. Hindu Joint Family.

The Special Commissioners made a similar deciding order confirming the assessments of income tax.

It was against these deciding orders that the present appeals to the High Court by way of case stated were brought. As before the Special Commissioners, the appeals are heard together.

The question framed for the decision of the High Court was stated to be a question of law whether on the facts as found and as set out, the Special Commissioners were right in making their decisions. It is reasonably clear that in framing the question the Special Commissioners had in mind that the burden of proof in the appeal before them from the decision of the Comptroller-General of Inland Revenue lay with the appellants and in their judgment they had not discharged this burden. Insofar as an appeal of this nature by way of case stated can be said to be against the legal effect of the facts found by the Special Commissioners, it is not within the normal competence of the High Court to differ from the facts as found, especially in the absence of the evidence led and adduced at the hearing from the record of the case stated and since the practice as laid down is for the Special Commissioners to state the facts as found by them, not even, to consider whether the facts so found were properly and probatively established on the evidence. But it is equally clear that where the finding of the Special Commissioners is an inference drawn or to be drawn from the facts found by the Special Commissioners or where there has been no finding which is relevant, the High Court on appeal is in as good a

position as the Special Commissioners were to draw this inference as to make the necessary finding. As was said by Cave L.C. in *British Insulated & Helsby Cables* v. *Atherton*[1] at page 213 on the question whether the payment concerned was in substance a revenue or a capital expenditure:

"This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case, but where as in the present case, there is no express finding of the Special Commissioners upon the point, it must be determined by the courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities."

On the inferences drawn by the Special Commissioners of the existence of the B. and the N. joint families, I am not at all certain whether the appeal against these inferences was or was not abandoned at the appeal. Arguments were addressed to the Special Commissioners on whether there was on the law and in the light of the dealings within and between the members of the family of Moolchand in existence such joint families but no such submissions were made to me. However there is no provision in the stating of a case to the High Court for the submission of grounds of appeals and it is because of this that I cannot be certain whether there is or not such an abandonment, and I conceive it to be my duty to deal with it.

But the matter can be easily disposed off. The deed of partition of 15 April 1952 (Annexure 4) clearly partitioned the Moolchand joint family known since the death of the founder as the Shuparshad family into two branches, one of which concerned the four members who elected to retain the properties in Malaya and also to remain as a joint family. As admitted by their then solicitors' letter (Annexure 6), the effect of this deed of separation was that N. Kelascharan and the widows of Shuparshad and Bishambar Dayal continued as a joint family, separate from Dau Dayal and Inderbhan. Then by deed on 15 February 1958, the members of this joint family in Malaya confirmed their partition as from 1 January 1957, N. and Kelascharan as sons of Moolchand and Premati as the widow of Bishambar Dayal s/o Moolchand being entitled to ¼th each of the assets of the joint family and B., Srinivas, sons of Shuparshad s/o Moolchand and Kalapathy widow of Shuparshad to 1/12th share each derivative from the ¼th share entitlement of Shuparshad. Either in view of the involved nature of the assets or because of deliberate selection, the male parties to this deed of 15 February 1958 elected to continue the business of Shuparshad and Brothers, hitherto carried on as general merchants in Cameron Highlands as a partnership, which was registered under the Registration of Businesses Ordinance. On 24 January 1962 (Annexure 12) Kelascharan retired from the partnership, which however continued as between the other three. For the years of assessment 1960 to 1963, N. submitted returns for and on behalf of the N. family, signing thereon as karta and giving under the column for the name and address of partners, the names of himself, Ram Prakash, Sita Ram and Santosh Ram, who presumably were members of his family. He died in 1965. Thereafter the returns of the N. family for the years 1964 and 1965 were made by B. as karta of the joint family.

For the years of assessment 1961-1966, B. submitted returns for the B. family of which he declared himself to be the karta. He gave the names of himself and his children as members of this family though for some reasons unknown to me he left out the name of his wife. The assessments were for years subsequent to the deed of partition of 15 February 1958.

The Special Commissioners accepted the two deeds of partition and on their effect and on the declarations of the parties themselves, held, in their words, that the appellants had failed to prove to their satisfaction that there were not the two Hindu Joint Families. With respect, it seems to me that they could, with equal truth and perhaps greater force, have said that the documentary evidence produced and perhaps the other evidence led would establish with a very reasonable degree of certainty the existence of these two families as Hindu Joint Families. The careful separation by B. of his income from the Agricultural Experimental Green Leaves contract carried out at the partnership premises as his own personal income and distinct from the partnership of Shuparshad and Brothers must, if at all, serve as further confirmation.

In my view therefore, I do not think that there can be any possibility of any mistake on the part of the Special Commissioners in their findings of fact and the inferences they drew from such findings. This would then seem to be the end of the matter, in terms of the question posed on the case stated to the High Court. But it is clear from the record that the arguments of counsel for the appellant before the Special Commissioners took the form of a proposition that the application of the law and practice of the Hindu Joint Family is ultra vires the Constitution. Federal Counsel not only did not deny and did not oppose the submission of counsel for the appellant at the appeal before me but himself embarked on a submission *contra* and despite the apparent limitation of the question put up, I conceive it to be within my competence in this appeal to hear and decide on such a submission at least in part. In any event, the same submission was made to the Special Commissioners who referred to it in the Grounds of Decision and dismissed it, though somewhat summarily.

Counsel for the appellant first submitted that his arguments fell naturally into two grounds, namely, that —

(1) Section 72 Income Tax Act 1967 which deals with Hindu Joint Families does not apply to Hindus whose domicile is Malaya and can apply only to Hindus who are domiciled in India.

(2) If section 72 is held to apply to the appellant it is in violation of Article 8 of the Constitution of Malaysia and therefore void by virtue of Article 4 of the Constitution.

On the first ground, the Special Commissioners could find nowhere in the Act any limitation of the provision of the law of Hindu Joint Family for tax purposes to Hindus who were not citizens of Malaysia.

Counsel for the appellant while contending that his client subscribed in the matter of Hindu Joint Family law to the Mitakshara school of law and not

to the Dayabbaga school from which it is distinguished, *inter alia*, by the right of devolution by death and by partition, conceded that the law pertaining to Hindu Joint Family, as set out in the grounds of decision at pages 86-91 of the Record is correctly stated. There is thus no necessity for me now to repeat the statement of the law. The only duty for me is to apply the law where and when it is applicable.

For his part, counsel for the appellant contended first that his client Brijkishore and Nandkishore, now deceased, were citizens of this country with a domicile of choice firmly established in this country. About this, there was no dispute by Revenue. Next, it was submitted that the personal law of a person was determined by his domicile. For this, reliance was put on the following dictum of Thomson J. (as he then was) in *Dorothy Yee Yeng Nam* v. *Lee Fah Kooi*[2] at page 263 —

"Now there is room for some confusion of thought on this question of personal law. The general principle of private international law as recognised in England is that a person's personal law depends on his domicile, that is to say, it is the law of the civil society to which he belongs for the time being."

Re. Craignish[3] and *Douglas* v. *Douglas*[4] were also relied on. On this it was contended that the personal law applicable to the appellants was the law of this country and under this law, the joint family system as understood in India was not part of the law except in those cases where persons domiciled in India have some property in this country forming part of the Hindu Joint Family property. Counsel cited in support of his contention the cases of *Meyappa Chettiar* v. *The F.M.S.*[5] and *Somdara Achi* v. *Kalyani Achi*.[6]

For myself, I am prepared to accept the contention that a man's personal law is the law of the forum in which he lives, but with respect, to say that the law of Malaysia excludes the personal law of the individual is, I may so put it, and with respect, to ignore the proviso to section 3(1) of the Civil Law Ordinance No. 5 of 1956 (the law then in force), which gives effect to "the circumstances of the states comprised in the Federation and their respective inhabitants permit and subject to such qualification as local conditions render necessary," and to the several decisions not only of the High Courts but of higher tiers of this country as well as of India on the question whether an emigrant Hindu carries with him his personal law and custom having the force of law.

As to this, it is set out in the Preliminary Note at page 787 of *Mallal's* Digest of Malaysian and Singapore Case Law (3rd Edn.) that the law is settled beyond doubt that where a Hindu family emigrates from one part of India to another, the presumption is that it carries with it its personal law, that is, the laws and customs as to succession and family and that such personal law is part of the status of every family which is governed by it. This presumption is rebuttable. It is also settled law, settled by no less an authority than the Privy Council, that a Hindu migrating to a foreign country carries with him his personal law, unless he establishes that he has adopted the law of the people among whom he has settled. The note is backed by a wealth of authority. It is not, I presume to hold, necessary for me to canvass these authorities or discuss them in detail, as that would be to pad out this judgment unjustifiably. I would content myself with saying that I have personally satisfied myself from a reading of these authorities that the propositions set out in that Note are correctly stated: see also the article by the late S. K. Das on the Nattukottai Chettiars in Malaya in pages xiv-xxii & pages xxvi-xxxiv in the 1958 Volume of the M.L.J.

On the law as settled I must therefore hold that where a Hindu shows the deliberate preservation of his personal law, as here in the matter of joint families, he is bound by such personal law, despite the fact that he has now emigrated to another country and has acquired a domicile of choice in the country of his adoption.

To my mind, section 72 of the Income Tax Act No. 47 of 1967 (now Act No. 53, 1971 Edition) merely re-enacts what is the personal law by deliberate election of citizens of Hindu origin custom and religion.

With respect, I would purport to take the further point that this view of the law is a matter of great convenience. If the Hindu members of a family so conduct their affairs and write up their accounts on the basis of a joint family, then it does not take much imagination to see how difficult it would be to disentangle such accounts to clarify the liability of each member for income-tax. The legislative provision in section 72 must be seen therefore to avoid such difficulties.

The further argument is on the constitutionality of section 72. It calls into question the validity of what is in fact a law made by Parliament and though a case stated is in terms not a proceeding for a declaration of invalidity of such a law, it in effect calls for a determination on the basis of a consideration by me whether the law in question was *intra vel ultra vires* the Constitution. In other words, such a determination would call for a declaration, and if I am right, then by the provisions of sub-clause (4) of Article 4 and of Article 128 of the Constitution, the matter is beyond my jurisdiction and lies exclusively, after the leave of a Federal Judge has been obtained, with the Federal Court.

But for what it is worth, I would, greatly daring, venture to suggest that inasmuch as it lies within the election of the members of a Hindu joint family to partition the assets and to exist thereafter as individuals, the provision in section 72 of the Act cannot be said to be a legislative discrimination against certain citizens. It is their deliberate choice to remain a Hindu joint family. They must be taken to have elected to be treated as such.

The appeal is therefore dismissed with costs and the deciding order of the Special Commissioners confirmed.

Appeal dismissed.

Solicitors: *Lim Kean Chye & Co.*